

15BMMUNC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 IN RE MUNICIPAL DERIVATIVES  
4 ANTITRUST LITIGATION

08 Civ. 2516 (VM) (GWG)

-----x

5 New York, N.Y.  
6 May 11, 2011  
11:15 a.m.

7 Before:

8 HON. GABRIEL W. GORENSTEIN,

9 Magistrate Judge

10 APPEARANCES

11 HAUSFELD LLP

Attorneys for Direct Class Plaintiffs

12 BY: MICHAEL D. HAUSFELD  
13 MEGAN E. JONES

14 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

Attorneys for Plaintiffs City of Oakland, et al.

15 BY: JOSEPH R. SAVERI

16 KING & SPALDING

Attorneys for Defendant Bank of America

17 BY: KEVIN R. SULLIVAN  
SHANNON M. KASLEY

18 ERIC T. SCHNEIDERMAN, Attorney General of  
19 the State of New York

Department of Law

Attorney for Intervenor

20 BY: ELINOR R. HOFFMANN

15BMMUNC

1 (Case called)

2 THE COURT: We are here based upon a number of letters  
3 that I asked, I guess four dated May 3 and another four dated  
4 May 9.

5 Well, I'm in a little bit of a difficult situation  
6 because Judge Marrero has not indicated in any great detail the  
7 substance of what he expects would be included in the class  
8 notice. He has issued an order, certainly, on the topic, the  
9 March 1 order, and there is some words that everyone is trying  
10 to parse there. And I think they provide some guidance but not  
11 perhaps 100 percent guidance as to what is relevant here in  
12 terms of the plaintiff's requests for discovery.

13 So I think what I want to try to do as a model is the  
14 following. I don't know if it's going to work, but I'd like to  
15 try it. And the model is that if there is some piece of  
16 information or discovery that's not burdensome and that can be  
17 supplied on a reasonable time frame, I'd like the plaintiffs to  
18 get it, and then we can postpone the argument about its  
19 relevance to the presentations that will be made to Judge  
20 Marrero.

21 I guess my main point that I'd like Bank of America  
22 and the Attorney General to keep in mind is that the mere fact  
23 that the plaintiffs get some piece of information does not, by  
24 any means, mean that I think it's something that should be  
25 included in the class notice. For all we know, the class

15BMMUNC

1 notice, just as is written out, will be satisfactory to Judge  
2 Marrero the way the defendants wrote it. I don't know. But  
3 certainly any rulings that I make. Let's say that the  
4 plaintiff should get some piece of information, assuming I make  
5 such rulings, has no bearing on that question.

6 And I guess at the end of it we should probably set  
7 the deadline for when the presentations are going to be made to  
8 Judge Marrero, because right now I don't know that there are  
9 any such deadlines. I don't even think he has put in a  
10 deadline.

11 So with that in mind, I think what I'd like to do is  
12 go through the categories of information. And if it's  
13 something that Bank of America has, I would certainly turn to  
14 them first. And then if it's something that only the Attorney  
15 General has, then I will turn to the Attorney General's office.

16 I think I have worked off the letter from Ms. Jones of  
17 May 3 for purposes of figuring out the categories, and I'm  
18 limiting myself to what's identified as A through E in the  
19 first paragraph of that letter, so I think I'd like to go  
20 through that. I think that's the universe. I notice the word  
21 inter alia is used. That's not very helpful. I am going to go  
22 through those. And if for some reason the plaintiffs think  
23 there is something else, I guess I would be willing to hear  
24 from them on that point.

25 On question 1, to whom the state agreement is being

15BMMUNC

1 mailed, again, my ground rule here for the moment is, I don't  
2 want to hear about relevance. I just want to hear about burden  
3 and timeliness.

4 So limited to that question, I'll turn to Bank of  
5 America because I know they offered some things and they said  
6 they had some things, or maybe I should turn to plaintiff first  
7 to see what they are missing.

8 MR. SULLIVAN: Your Honor, Kevin Sullivan. I'm happy  
9 to go through it and tell you what we have given them, and then  
10 they can say if they don't have it or not. But it's up to you.

11 THE COURT: Go ahead.

12 MR. SULLIVAN: In terms of to whom the notice of state  
13 agreement is going to be mailed, it is defined --

14 THE COURT: Are you repeating things, if I might ask,  
15 that are in your letter? If you are, it might be better for  
16 plaintiffs to say why it was inadequate. If this is something  
17 completely new to them, go ahead.

18 MR. SULLIVAN: This is information we have identified  
19 in our letters.

20 THE COURT: Then let's hear from them as to why it's  
21 unsatisfactory.

22 I'll now turn to plaintiffs. They provided certain  
23 information in their letters. Tell me what more you need or  
24 why it's not satisfactory. Or maybe it's fine. I don't know.

25 People should remain seated because people are on the

15BMMUNC

1 telephone, and we need to be close to the microphones.

2 MR. HAUSFELD: This is Mr. Hausfeld, your Honor. The  
3 description made by Bank of America is by category as opposed  
4 to by identification of entity.

5 THE COURT: Do you want a list of the entities?

6 MR. HAUSFELD: Yes. And we would need an  
7 identification of the definition of a covered derivative so we  
8 have the identification of the products that are being covered  
9 in terms of the entities that are being addressed.

10 THE COURT: List of entities and identification of the  
11 particular product.

12 Talk to me about burden on that.

13 MR. SULLIVAN: Your Honor, they have every entity that  
14 comprises the universe of who is going to get the notice  
15 because they have the same damage data that the AGs have.

16 In addition, they have --

17 THE COURT: Mr. Sullivan, if I'm speaking, it's really  
18 important that you listen to me. You interrupted me once. If  
19 I have got something in my mind, if you don't satisfy me, we  
20 are never getting out of here.

21 Normally, in discovery disputes when people say they  
22 already have it, I say, sorry, produce it again. Tell me what  
23 the problem is with giving them the list of entities.

24 MR. SULLIVAN: Your Honor, there is no problem with  
25 giving them another set of the same database that they have,

15BMMUNC

1 that have some of the entities in it.

2 In addition, we have agreed to give them a specific  
3 list of addresses for counter parties that we have. And they  
4 asked us for that information in connection with the Morgan  
5 Stanley settlement. We said we would produce it based upon on  
6 what they wanted it for. They then said they may want it for  
7 other purposes. We are happy to produce it to them as long as  
8 we know what they want to use it for.

9 The only thing we don't want them to use it for is to  
10 go out and make separate contact with the eligible counter  
11 parties before this process is over.

12 THE COURT: It sounds like you're willing to give them  
13 the lists of entities. And what about the identification of  
14 the product?

15 MR. SULLIVAN: The identification of the product is in  
16 the database they have. We can give them the list of the  
17 entities with the trade number. They can run that against the  
18 database they have and figure out exactly what product that  
19 entity traded with that, and they will have all the  
20 information.

21 THE COURT: Does that make sense to you on this side?

22 MR. HAUSFELD: Not really, your Honor. The proposed  
23 settlement agreement covers -- includes covered derivatives  
24 with no definition of what a covered derivative is so that a  
25 participating entity, all of whom would also be members of the

15BMMUNC

1 class, would not know which derivatives are being included  
2 within the proposed settlement.

3 MR. SULLIVAN: Your Honor, the covered derivatives are  
4 defined in the agreement with the AG as agreements that are  
5 covered by what's called attachment A. Attachment A then  
6 provides more information about what those covered derivatives  
7 are. The eligible counter party that received the notice will  
8 get a specific amount, will be told exactly how much money they  
9 are eligible to receive. The plaintiffs will know who those  
10 counter parties are because we would have told them. They will  
11 know --

12 THE COURT: Told them when?

13 MR. SULLIVAN: They have the full list now. We will  
14 give them the addresses which has the specific list from 1998  
15 to 2003 that Bank of America considers the group. The Attorney  
16 General will make the final decision as to who actually gets  
17 the notice, not Bank of America. So if there is information  
18 that the Attorney General needs to give, they can ask them.  
19 But they will have the list of the eligible counter parties and  
20 their addresses and they will have all of the information about  
21 the trades that they did.

22 MR. HAUSFELD: Sounds to me, your Honor, as if the  
23 Attorney General should be providing that information. For  
24 example, in attachment A to which Mr. Sullivan refers,  
25 municipal derivatives is defined as municipal derivatives that

15BMMUNC

1 are purchased by a particular entity. That's not a sufficient  
2 definition to understand what type of municipal derivative --

3 THE COURT: You know for each particular entity what  
4 derivative?

5 MR. HAUSFELD: Yes.

6 THE COURT: Do you have that or only the Attorney  
7 General has that?

8 MR. SULLIVAN: The Attorney General makes the final  
9 decision as to who gets this notice.

10 THE COURT: Has that decision been made yet?

11 MS. HOFFMANN: Your Honor, that decision has not been  
12 made with finality yet. We are still addressing the criteria  
13 in the agreement.

14 I do want to point out that the notice also defines  
15 the covered derivative, and the information upon which we base  
16 our list of addressees database is the same database that I  
17 believe plaintiffs have. We do not have a definite list of the  
18 addressees yet.

19 THE COURT: When are you going to have it?

20 MS. HOFFMANN: We are hoping soon.

21 THE COURT: Meaning tomorrow or a month from now?

22 MS. HOFFMANN: I hope within a week from now, but I  
23 don't know for sure.

24 THE COURT: Can you provide it to them in a week from  
25 now? Can you do it?



15BMMUNC

1 MS. HOFFMANN: Your Honor, our position is that we are  
2 not subject to discovery at all. Whether we do that, I would  
3 have to take that up with my group, because to some extent it's  
4 a policy decision within each person's office. But I would be  
5 concerned about --

6 THE COURT: Are you not going to be providing it to  
7 Bank of America?

8 MS. HOFFMANN: Yes. Bank of America will --

9 THE COURT: They could provide it, if that makes you  
10 feel better.

11 MS. HOFFMANN: I would be concerned, as Mr. Sullivan  
12 was, about the purpose for which these addresses are going to  
13 be used.

14 THE COURT: That I could limit through an order saying  
15 they can only be used for purposes of making a proposal as to  
16 the content of the class notice, be limited to those two.

17 I assume you couldn't object to that, right?

18 MR. HAUSFELD: We would probably agree to it, your  
19 Honor.

20 THE COURT: It sounds like you are going to have this  
21 in a week to Bank of America to turn it over to plaintiffs.

22 MS. HOFFMANN: We hope to. We are talking with Bank  
23 of America. There are some deals that we can't match to make  
24 sure they correctly belong in the group, and we are working  
25 through that.

15BMMUNC

1 THE COURT: I don't want to rush you because you folks  
2 are the ones with the greatest incentive to move this along.

3 MS. HOFFMANN: We are trying to move it along as  
4 quickly as possible. We are working diligently to do that. I  
5 think Bank of America has been diligent also in working with us  
6 on that issue, and we are trying to finalize the list. Again,  
7 I'm not in a position to agree to produce it.

8 THE COURT: I'm not asking you to agree. I'm just  
9 asking when you are going to be giving it to Bank of America.

10 MS. HOFFMANN: Again, I'm hopeful it will be done in  
11 the next week. It has taken longer than we expected.

12 THE COURT: Is this going to include the  
13 identification of the product that we have been talking about?

14 MS. HOFFMANN: Our list will not include the precise  
15 identification of the product, I don't believe. I have to go  
16 back and check. But I think that can be easily determined from  
17 the trade numbers associated with them.

18 THE COURT: So is this going to do it?

19 MR. HAUSFELD: It's difficult to say, your Honor,  
20 because we also need the allocation formula in order --

21 THE COURT: I haven't gotten to that yet. Is it  
22 related?

23 MR. HAUSFELD: Yes.

24 THE COURT: Go ahead.

25 MR. HAUSFELD: In the complaint that was filed by the

15BMMUNC

1 class plaintiffs, there is a definition of covered derivatives  
2 and there are seven types of derivative products. In general  
3 discussions with the bank it's been their position that there  
4 were overcharges on some but not all of those derivative  
5 products. We would need to know how the bank and the states  
6 reached agreement as to which derivative products they were  
7 making restitution on to be able to advise our clients and for  
8 potential putative class members to understand which derivative  
9 products they purchased. They were receiving restitution, yet  
10 were being required to give releases on all derivative  
11 products.

12 THE COURT: It seems to me, unless I'm  
13 misunderstanding you, that what a particular party needs,  
14 perhaps, is the amount of money that they are getting. It  
15 covers -- they are going to give up a claim against any  
16 possible product they have with respect to Bank of America,  
17 right?

18 MR. HAUSFELD: Yes. But that's the problem. There  
19 are seven different products that could have been purchased.  
20 The payment may only go to one or two.

21 THE COURT: But surely the party knows what product it  
22 has, or doesn't it?

23 MR. HAUSFELD: It will know what products it  
24 purchased. It will not know what products the restitution is  
25 being made on and what products for which there is no

15BMMUNC

1 restitution.

2 THE COURT: That's what I don't understand. What does  
3 it matter? They are getting the sum of \$100,000. If they  
4 purchased four of the seven products and whether their formula  
5 discounted one particular product as zero or get paid three  
6 cents on the dollar for another one, what does it matter? They  
7 know what they are getting to cover everything.

8 MR. HAUSFELD: It matters because of the mix of  
9 products that purchases may be more weighted for those products  
10 for which they are not getting any restitution. And the  
11 participating entity may wish not to release all its claims and  
12 to pursue those claims because it had larger purchases in the  
13 nonrestituted products.

14 THE COURT: You still lost me. Because they have to  
15 give up all the claims, regardless. They have to give up their  
16 claims on everything, regardless.

17 MR. HAUSFELD: That's a choice that they need to make.  
18 And in making that choice, if in fact they have greater  
19 purchases in products for which they are receiving no  
20 restitution, they may decide that it's not worth it to take two  
21 cents on 2 percent of their sales when they have, you know,  
22 maybe dollars on 98 percent of their sales.

23 THE COURT: Let me try it one more time. I bought  
24 seven products, A through G. I'm being given \$100 to  
25 extinguish my claims against Bank of America. What does it

15BMMUNC

1 matter if in Bank of America or in the Attorney General's mind  
2 \$98 is being allocated to product F? You come back when I ask  
3 you that question and you say, well, it might matter because  
4 they feel that product A, in fact, is worth a whole lot of  
5 money and they are only being paid 50 cents on product A. I  
6 keep saying to you, they are giving up their claim for A  
7 through G for \$100. And if they think product A is worth a  
8 thousand dollars, then they won't do it.

9 MR. HAUSFELD: There is not ability of a potential  
10 claimant to make that assessment, your Honor, given the fact  
11 that all they are talking about in the notice and in the  
12 settlement is an aggregate of derivative products. If I only  
13 bought one of product A, but 99 of products B through Z, and  
14 I'm getting \$2 for product A, I may not want to opt into a  
15 settlement where the greater portion of my purchases deal with  
16 a product for which I'm not receiving any allocated  
17 restitution.

18 THE COURT: I feel we are having the same conversation  
19 literally three times. Can anybody help us here? Am I missing  
20 something?

21 MR. SULLIVAN: You've stated it exactly correctly.  
22 The notice gives them a specific amount they are entitled to.  
23 They know what transactions they have done with Bank of  
24 America. The notice tells them that others, including the  
25 class plaintiffs here or the Oakland plaintiffs, feel they can

15BMMUNC

1 get them more, and they were -- also, they might end up getting  
2 less. They have the information from which they can then make  
3 a judgment. If they have a question, if they have options,  
4 they can call the Attorney General in their state if it's one  
5 of the working group members, they can consult --

6 THE COURT: You're straying. I don't want you to  
7 stray.

8 MR. SULLIVAN: They have options. They have the basic  
9 information. They know what transactions they have entered  
10 with Bank of America. And they know what they would have to  
11 release. Whether they have done five or ten or one transaction  
12 with Bank of America, they can -- they have enough information  
13 to make a reasoned judgment as to whether this makes sense to  
14 them. And if it doesn't make sense to them or they are  
15 confused and do nothing, they lose no rights. They don't give  
16 up their claim.

17 THE COURT: Again, we are getting outside the areas.  
18 I know all this. I'm still in exactly where I were before.  
19 Nothing you said, unfortunately, Mr. Hausfeld, has explained  
20 the relevance of this.

21 As an aside, I know I said I wasn't going into  
22 relevance, but for some of these I think I am going to because  
23 I have to understand in order to even allow discovery on it.

24 Did someone else have an idea?

25 MR. HAUSFELD: Can I try this, your Honor. If the

15BMMUNC

1 list is being composed of those entities which purchased  
2 covered products, and notice is being sent to those who are  
3 deemed qualified by the state AGs, based on purchases that the  
4 state AGs are connecting with regard to this settlement, that  
5 information is readily available. And if that information is  
6 not only possessed by the states but is the nexus for the  
7 states sending out not only the notice but the amount, it would  
8 seem not burdensome to provide us with the same information  
9 which provided the basis for the state's decision as to who  
10 gets the notice and what amount of money they are getting,  
11 based on the transactions that the state believes are covered.

12 THE COURT: I am not sure I followed what you just  
13 said. Try it again. What is it you want? We already talked  
14 about your getting a list of entities and the products when  
15 they have finished doing this task. Are the amounts included,  
16 too?

17 MS. HOFFMANN: Your Honor, in the list --

18 THE COURT: They can derive the amounts?

19 MS. HOFFMANN: In the notice -- the notice will  
20 clearly state the amount to which each entity is entitled to.

21 THE COURT: I think they are looking for -- are you  
22 looking for the amount in advance, or not necessarily?

23 MR. HAUSFELD: My understanding is, the notices will  
24 contain an amount in advance.

25 THE COURT: I know the notice will have an amount.

15BMMUNC

1 I'm talking about whether you in discovery are looking for the  
2 amount for each particular entity.

3 MR. HAUSFELD: Yes.

4 THE COURT: And was that part of what we had  
5 previously agreed you were going to be giving to Bank of  
6 America and Bank of America was going to be giving to  
7 plaintiff?

8 MS. HOFFMANN: Your Honor, we were not planning to do  
9 that, no.

10 THE COURT: Our discussion had been the list of  
11 entities and some number that would allow them to derive the  
12 products that were involved.

13 MS. HOFFMANN: That's right. There has been reference  
14 to the transactions.

15 THE COURT: When I then turn to you and said, what  
16 more are you looking for, you started talking about allocation.  
17 We started going down the road where I said the same thing five  
18 times and you said the same thing five times, we made no  
19 progress. I am not sure where we are right now.

20 MR. HAUSFELD: We would like to be in the same  
21 position that the state AGs are in in terms of understanding  
22 not only who gets the notice, but what transactions prompted  
23 the state AG not only to send the notice to that entity, but  
24 the amount that the state AGs ascribing to that entity, and  
25 then the products that were purchased by that entity that the



15BMMUNC

1 state AGs have determined are eligible for restitution.

2 THE COURT: Again, you still have not persuaded me  
3 even as to relevance to this. I don't know if you want another  
4 shot at it, but I feel like we have done this a bunch of times.  
5 If you have nothing more to add, tell me and we will go on.

6 MR. HAUSFELD: If I could try it this way. I am not  
7 sure it's adding, but hopefully clarifying. We would like to  
8 be in the same position as the state AGs are in with respect to  
9 the knowledge as to not only who is being solicited to opt in,  
10 but why they are being solicited to opt in, and the basis for  
11 the decision by the state AGs as to which products the state AG  
12 is allocating a restitution and the amount. All of that  
13 information --

14 THE COURT: I guess my response to that is, I need to  
15 know why that is going to enable you to make comments or  
16 propose language in the class notice that you wouldn't have  
17 otherwise been able to do?

18 MR. HAUSFELD: Because with respect --

19 THE COURT: And if the answer is, you want to judge  
20 whether they did a good job of coming up with the amount of  
21 money, that's going to be a very tough road for you to hoe. I  
22 don't know that that's something that you're entitled to know.

23 MR. HAUSFELD: Despite the absence presently of the  
24 reference to detailed findings and conclusions by the Court in  
25 a separate opinion, the Court expressed three essential

15BMMUNC

1 concerns.

2 THE COURT: You're talking about Judge Marrero?

3 MR. HAUSFELD: Yes.

4 THE COURT: Go ahead. Unfortunately, the one thing I  
5 didn't bring was the most important thing, which was the letter  
6 that had all the documents attached to it. But I happen to  
7 have a copy of the --

8 MR. HAUSFELD: He identified as page 3 three essential  
9 concerns about this process. And just before the paragraph  
10 that's labeled ordered, he identified that it was necessary to  
11 protect the interests of the putative class members, to protect  
12 the Court's jurisdiction, and to preserve the Court's ability  
13 to render meaningful relief on the claims before it.

14 Clearly, the information we requested is extremely  
15 relevant to that last of the Court's concerns because what  
16 relief may be obtained now will clearly affect the relief that  
17 the Court can render to the rest of the class under the  
18 remainder of the claims because this is a matter involving  
19 joint and several liability, at a minimum.

20 THE COURT: But if I'm an entity and I'm deciding  
21 whether to opt into this or not, what I need to know is how  
22 much I am getting, and then make a judgment about whether I can  
23 do better in the class action.

24 MR. HAUSFELD: That would only be, your Honor, if  
25 you're getting either something for everything. But if you're

15BMMUNC

1 getting something for less than everything that you did,  
2 another aspect of what you would need to decide is what it was  
3 that you purchased and whether or not you think that what  
4 you're getting is sufficient to release your claim for  
5 everything when the greater portion of what you purchased may  
6 not be compensated for at all.

7 THE COURT: I'm getting a single number to cover  
8 everything. This is the same thing we did five times. I don't  
9 know if I want to do it six times.

10 MR. HAUSFELD: I don't disagree with your Honor's  
11 present position, but it's a position in a class that occurs  
12 inherently when there is a number of items that are purchased.  
13 If I purchase ten different items and I purchase item one only  
14 once, but I purchase the other nine a thousand times, it may  
15 not be worth it to me to take a settlement as a single sum for  
16 all the purchases if all I'm getting is a penny on the one item  
17 that I bought. If, however, it may be, your Honor, that it's a  
18 penny for all ten items, then I could understand that my claim  
19 may not be worth that much in the aggregate.

20 THE COURT: What do you care what's going on in the  
21 mind of a person who is offering you? If they are offering you  
22 \$100, what does it matter if in their mind the hundred is  
23 allocated all to item A or all to item G? What does that  
24 matter? You are giving up A through G, regardless.

25 MR. HAUSFELD: Because it may make a difference to me

15BMMUNC

1 if I have greater purchases in the items for which I'm not  
2 being offered any restitution, and I may decide that I want to  
3 pursue my claims for those products.

4 THE COURT: We have now done it seven times. That's  
5 it. We are done. I keep saying the same thing and your answer  
6 just doesn't make any sense to me, Mr. Hausfeld. I know you  
7 are trying to explain it to me. I know you are doing a  
8 good-faith effort. But you have not persuaded me that this  
9 even meets the relevance standard that I would need to require  
10 production of information on it.

11 We need to go on to another category. You are going  
12 to have your opportunity, presumably before Judge Marrero when  
13 you write a letter saying that I have denied you this thing.  
14 If he disagrees with me, maybe he will send it back.

15 Let's go on.

16 MR. HAUSFELD: Yes.

17 The next area, though --

18 THE COURT: We may have covered other things.

19 MR. HAUSFELD: I was about to get exactly to the next  
20 area. The allocation formula is something that we would want  
21 to know.

22 THE COURT: This is the same issue, in my mind, right?  
23 This is the same principle that is at issue.

24 MR. HAUSFELD: It's without the detail. It's the  
25 overview. What formula was used to make the allocation on an

15BMMUNC

1 individual entity.

2 THE COURT: As between particular entities.

3 MR. HAUSFELD: Yes.

4 THE COURT: As opposed to how we came up with the 65  
5 million, which is what more of our discussion was going to and  
6 why I should or should not accept my piece of the 65 million.  
7 This is the question of -- how many potential opt-ins are  
8 there, approximately? 5,000, 50,000?

9 MR. SULLIVAN: I can give a guesstimate of that.  
10 There were approximately -- just one second. There are well  
11 over 3,000 trades in the entire damage database. The number of  
12 counter parties in the '98 to 2003 time period would be a  
13 subset of that, so it's a significant number.

14 THE COURT: Let's pretend it's 4,000. So what you're  
15 asking, of the 65 million, how did they pick a number for each  
16 of those 4,000 people?

17 MR. HAUSFELD: What formula, if any, was used to  
18 derive the amount that each would get?

19 THE COURT: Unfortunately, I need to pose the same  
20 question to you, which is to say, I, as an entity, am going to  
21 learn that my share is \$100,000. Why will it matter to me  
22 whether the municipality next door got 50,000 or 150,000, or  
23 whatever it might be?

24 MR. HAUSFELD: If there is no rational basis for it,  
25 you may decide that this is nothing that you want to accept.

15BMMUNC

1 It is a standard requirement in any settlement of collective  
2 claims, multiple claims dealing with the same wrong that class  
3 plaintiffs always identified to the Court and to the class.  
4 And here there is no difference between soliciting opt-ins or  
5 sending out a notice to a class where they can opt out if they  
6 choose not to participate. You need to include the formula of  
7 allocation so everyone understands that you weren't treated  
8 disparately from someone else in the same position.

9 MS. HOFFMANN: Your Honor, may I address that?

10 The first thing I'd like to say is that we believe  
11 that the notice as drafted provides a description of the  
12 allocation formula that's consistent with notices that we  
13 reviewed even in class actions, even ones that Mr. Hausfeld set  
14 out. We believe that's already provided.

15 THE COURT: Just remind me what paragraph that's in.

16 MS. HOFFMANN: Yes. If the Court has a copy of our  
17 question and answer packet, our proposed question and answer  
18 packet.

19 THE COURT: Yes.

20 MS. HOFFMANN: It's the answer to question 12, I  
21 believe.

22 THE COURT: Famous independent expert economist.  
23 Okay. Go ahead.

24 MS. HOFFMANN: We believe that's addressed. If the  
25 Court believes that it should be addressed to a greater extent,

15BMMUNC

1 we will certainly consider language that's more fulsome,  
2 subject to not revealing any confidential information or  
3 economic analysis that we need that's essentially our work  
4 product.

5 Your Honor, I also want to, if I can, draw a  
6 distinction between this settlement and class settlements. Our  
7 settlement is a settlement among sovereign states and the Bank  
8 of America. We have chosen to make the settlement fund  
9 available for claims of restitution from injured parties. We  
10 thought that was important thing to do. Our settlement is not  
11 a Rule 23 settlement and it's not subject, our position is, to  
12 any sort of a fairness inquiry.

13 THE COURT: I know all that. I think you are also in  
14 a situation where Judge Marrero has already decided that there  
15 is not going to be a fairness inquiry and that all that's going  
16 to happen is that there is going to be an opportunity for the  
17 plaintiffs to propose changes, additions to the notice, and  
18 that Judge Marrero is reserving the right to approve that  
19 notice. I understand that.

20 But I guess it would be worth somewhat addressing the  
21 question of why for purposes of Judge Marrero approving that  
22 notice he might not want the option of requiring that the  
23 particular opt-ins understand how their share was calculated as  
24 opposed to being just told, don't worry, we have some economist  
25 that did it.

15BMMUNC

1 MS. HOFFMANN: Your Honor, we certainly would be  
2 amenable to making the language better.

3 THE COURT: It's not a language problem. It's a  
4 substance problem.

5 MS. HOFFMANN: Or adding more substance to the  
6 description.

7 THE COURT: Are you willing to add a substance to the  
8 allocation formula? What kind of substance are you talking  
9 about?

10 MS. HOFFMANN: We could add more detail to the  
11 description, perhaps. I would like to talk to my colleagues.  
12 But what I don't think is necessary is discovery.

13 THE COURT: Let's talk about what the form of that  
14 discovery is. I'm not asking you to agree to anything or to  
15 admit that you're subject to the Court's jurisdiction.

16 But going back to my first principle, when I walked in  
17 here, assuming I found that this has enough relevance for me to  
18 require discovery, what is the problem from your point of view  
19 with providing the actual analysis that is leading to the  
20 allocation formula?

21 MS. HOFFMANN: Your Honor, that analysis includes some  
22 work product and economic analysis that we are applying  
23 elsewhere in our investigation, and we would not want to reveal  
24 that.

25 THE COURT: Because you feel that there would be what?



15BMMUNC

1 MS. HOFFMANN: We believe that it would be damaging to  
2 our investigation and to our ability to negotiate effectively  
3 with other participants in the industry that we are  
4 investigating.

5 THE COURT: And that would be because if they found  
6 out the formula, what would happen?

7 MS. HOFFMANN: Well, there are elements in the formula  
8 that relate to the economic analysis that our economists are  
9 using to calculate damages, overcharges on particular type of  
10 instances.

11 THE COURT: I couldn't follow that at all. What is  
12 going to be the harm if other people learned about this  
13 formula? I should add, I don't know that they would ever have  
14 to since I could make this a confidential production. I still  
15 don't understand what the harm is.

16 MS. HOFFMANN: Your Honor, my recollection of the  
17 allocation formula is complex. It includes elements of the way  
18 the economists looked at particular instruments and determined  
19 overcharges. And I don't think it would be appropriate to  
20 reveal that at this stage in our investigation.

21 THE COURT: That's a little conclusory, so I don't  
22 know that it's going to carry much weight.

23 MS. HOFFMANN: Again, we are willing to look at our  
24 language in the notice and determine if we can make that more  
25 detailed to provide greater insight into the allocation

15BMMUNC

1 formula.

2 THE COURT: If we were to order production, what is  
3 the format of which this is in right now? Is there some report  
4 that identifies the allocation formula?

5 MS. HOFFMANN: No, your Honor.

6 THE COURT: What is there?

7 MS. HOFFMANN: There is really nothing except  
8 exchanges among us and our economist regarding work product.

9 THE COURT: There is no report or paper or discussion  
10 of what formula should be used?

11 MS. HOFFMANN: I don't think there is anything that I  
12 would call a report, no.

13 MR. SAVERI: Your Honor, may I?

14 THE COURT: Sure.

15 MR. SAVERI: This is Joe Saveri from Lieff Cabraser.

16 It would seem to me that if there is nothing written  
17 down and it's all in the heads --

18 THE COURT: She didn't say that. She said it's in the  
19 form of e-mails.

20 MR. SAVERI: To the extent there is a writing, it  
21 would seem to me that there is some description. It doesn't  
22 have to be the arithmetic, but it could be some kind of  
23 description about how you value certain claims, how you  
24 distinguish certain claims, and how the \$67 million is going to  
25 be allocated between different types of people, potential

15BMMUNC

1 opt-outs or opt-ins. If that information exists, I haven't  
2 really heard much about why it would be burdensome to produce  
3 that.

4 THE COURT: It's not burdensome. There is another  
5 point which I accept as part of the burden, which is that there  
6 is some confidentiality work product.

7 MR. SAVERI: Your Honor, with respect to that, it  
8 seems to me that there are mechanisms that we could adopt to  
9 specifically allay those concerns. At this point we are  
10 talking about access to the information. We are not talking  
11 about whether the information that there is a confidentiality  
12 concern about would be put in the notice.

13 THE COURT: Let's pretend you get the formula,  
14 hypothetically. What do you then do with it in terms of making  
15 a proposal to Judge Marrero regarding --

16 MR. SAVERI: Now we are talking about the relevance of  
17 the material. We are not talking about the burden. But --

18 THE COURT: I haven't yet decided all this.

19 MR. SAVERI: I understand. Your question is what will  
20 we do with the information. And what we do with the  
21 information is we would look at it. And with respect to the  
22 notice, we would ask or make sure that to the extent that the  
23 notice describes what the individual recipient of the notice's  
24 share would be, whether that's fairly and accurately described.

25 I mean, your Honor, if the notice just says, you are

15BMMUNC

1 going to get \$100,000, that would be the lump sum and I  
2 understand that maybe that would be enlightening because the  
3 recipient knows how much they bought, and this is how much they  
4 are getting. But, I mean, my experience in having done a  
5 number of these cases is that one of the questions that someone  
6 will ask when they are trying to make an informed decision  
7 about whether to accept that or not is how is that calculated?  
8 What was the math? I think that's --

9 THE COURT: Now we are going back to the same problem.  
10 That's why I am shaking my head.

11 MR. SAVERI: Your Honor, I think to the extent there  
12 is a plan of allocation and it provides a basis for a  
13 description of how an individual share was calculated either by  
14 type, by some general description, that's information that we  
15 would say needs to be accurately described in adequate detail.  
16 It is simply not enough, we would argue, to say, there is a  
17 plan of allocation, your claim has been calculated pursuant to  
18 a plan of allocation, and that information is useful to  
19 determine for any individual recipient of the notice whether to  
20 opt in and accept it or not. They are going to ask that  
21 question.

22 MR. HAUSFELD: Your Honor, if I may, as pointed out by  
23 counsel for the Attorney General, there is a specific question  
24 in the notice packet that starts off in the heading, how was my  
25 share calculated? So, obviously, that is a question that they

15BMMUNC

1 anticipate is important to being answered. And the answer  
2 starts with: Your share was based on a formula. What we are  
3 asking for is the formula.

4 THE COURT: I understand it's an unsatisfactory answer  
5 for many reasons, but that doesn't mean that it's necessarily  
6 going to be relevant because it may be that that's an  
7 appropriate -- sometimes the answer is, how was my share  
8 calculated? Answer: We are not going to tell you that. Just  
9 decide based on the amount of money you got and you decide  
10 whether you want to do this. That could be an adequate answer.  
11 Just because the question is in here, that doesn't mean we have  
12 to give all the information on it.

13 MR. HAUSFELD: Your Honor is absolutely correct. If  
14 they said, it's none of your business, I would calculate what  
15 you got. That's not what they said. They said it's based on a  
16 formula.

17 THE COURT: Mr. Hausfeld, if it said, that's none of  
18 your business, we would still be here saying, we'd like to know  
19 how you did it anyway.

20 MR. HAUSFELD: I am not so sure. If they were candid  
21 in saying to their potential solicited opt-ins, how we  
22 calculated, it is none of your business, that would be an  
23 accurate description of what they did.

24 THE COURT: I think that's tantamount to what they  
25 have done right now. They have essentially said that's none of

15BMMUNC

1 your business. They just did it in the polite lawyerly way.

2 MR. HAUSFELD: I respectfully differ, your Honor. If  
3 someone says to me something is none of my business, I  
4 understand that. If they say to me, hey, your allocation was  
5 based on a formula --

6 THE COURT: Which we are not going to tell you because  
7 it's none of your business.

8 MR. HAUSFELD: Put that in.

9 THE COURT: I don't think we are going to solve this  
10 by putting in, this is none of your business. It's obvious  
11 they think it's none of their business because, otherwise, they  
12 would have put the formula in or they would even tell you.

13 MR. HAUSFELD: Your Honor, if I may, this is a  
14 settlement which, in essence, is intended to be class wide.  
15 You're soliciting an entire group of people that did business  
16 with a particular defendant that had already been sued before  
17 any state investigations by private parties, over which this  
18 Court has jurisdiction. Judge Marrero indicated he is  
19 concerned that this potential class type settlement is going to  
20 affect the Court's jurisdiction as well as his ability to  
21 confer meaningful relief on the remainder of the class and the  
22 remainder of the claims.

23 THE COURT: We are going over old area. I would just  
24 point out, it's not of the magnitude of concern that you had  
25 impressed upon me. If it was, he would have a fairness hearing

15BMMUNC

1 on it. It's something less than that.

2 MR. HAUSFELD: Your Honor, again, I respectfully  
3 disagree. Without the Court's statement of findings, reasoning  
4 and conclusions, as you started this hearing, it is a little  
5 unclear exactly what was bothering the Court and what he wanted  
6 to do about it.

7 And one of the things that we had asked at the  
8 beginning of this process, not with you, but with the bank and  
9 the state AGs, was to wait for the issuance of those findings  
10 and reasoning and conclusions which would have helped formulate  
11 responses more intelligently and rationally.

12 THE COURT: The ones from Judge Marrero?

13 MR. HAUSFELD: Yes.

14 THE COURT: I wouldn't count on your getting much more  
15 out of that. I've got a feeling that might be limited to the  
16 legal basis for the order. I don't know that it's going to  
17 elaborate on the content of the order. There is no point in  
18 waiting.

19 MR. HAUSFELD: In that respect then --

20 THE COURT: There may be a point in my doing my  
21 rulings and you're objecting and taking it to Judge Marrero.  
22 That's a different question. But we are not going to wait on  
23 anything.

24 MR. HAUSFELD: In that respect, when the Court raises  
25 concerns about actions which would undermine the Court's

15BMMUNC

1 jurisdiction, and which might impede the Court's ability to  
2 render meaningful relief on the remaining claims before it, I  
3 think all of these questions are significant and material to  
4 those concerns.

5 What makes this entire process unprecedented is the  
6 existence of a prior claim asserted in this court under federal  
7 jurisdiction which preceded by a year or more any state  
8 investigation, and clearly by more than a year of any attempted  
9 state settlement of the same claims that were sought to being  
10 settled by the class plaintiffs and to which this Court  
11 appointed a special master for settlement purposes.

12 All of those factors have to be put in context as to  
13 why the Court was bothered at all to do anything with respect  
14 to states that basely said then, as they say now, this Court  
15 has no right to oversee anything that I do. They have lost  
16 that. That's gone. Judge Marrero has taken some jurisdiction  
17 over this.

18 THE COURT: I feel we are repeating long-ago battles,  
19 not even battles from earlier today, but ones from February.

20 Here is my problem. I have concern about the Attorney  
21 General's work product issues and matters they deem  
22 confidential and matters that may affect other settlements. So  
23 I have now focused once again on the relevance point, and I  
24 feel I'm back in the same boat as I was with respect to our  
25 discussion regarding the particular amounts and how the amount



15BMMUNC

1 was derived for. I have the same issue for the allocation as  
2 between the parties. I know you disagree. I know you think  
3 that's very important. And you are welcome to object to my  
4 failure to provide discovery when you provide your comments to  
5 Judge Marrero. Okay?

6 MR. HAUSFELD: I respect your Honor's decision, and we  
7 will preserve our rights to think about it on appeal.

8 THE COURT: What's left in terms of the discovery  
9 requests that isn't covered by what I've already said here?

10 MR. HAUSFELD: Three essential elements. One dealing  
11 with the economic analysis, or the determination of the  
12 settlement amount in the first place.

13 THE COURT: The 65 million?

14 MR. HAUSFELD: Yes. The issue simply is was there  
15 such an economic analysis done independently by the State  
16 Attorney General's economist. And if there was, is it  
17 burdensome to produce that analysis.

18 THE COURT: What's your position on that?

19 MS. HOFFMANN: Your Honor, that goes to the heart of  
20 our work product in this investigation, and we will not produce  
21 it. We cannot produce that and maintain the integrity of our  
22 investigation and our work product on a going-forward basis.  
23 We believe that this is not at all addressed to compliance with  
24 the March 1 order. It has nothing to do with the language --

25 THE COURT: I just wanted to hear about burden,

15BMMUNC

1     though.

2             This is even a step removed from what we are talking  
3     about here in terms of what is important for plaintiff to know.  
4     They know they are getting a hundred thousand dollars. How the  
5     Attorney General evaluated the claim that led to them getting  
6     \$100,000 is even less pertinent than knowing the formula for  
7     the \$100,000. I think if you lose on the first thing a  
8     fortiori, you're losing on this one. I assume you can't make  
9     an argument that's more relevant than that.

10            MR. HAUSFELD: Your Honor, this has been instructive  
11     in this respect. It's becoming clear, from what's being said,  
12     that this is a settlement that's being offered to entities to  
13     opt in to take in the literal black box. They don't know the  
14     formula. They won't know the analysis. As long as we are in a  
15     position now, given those admissions and acknowledgements, we  
16     will be able to comment in a notice to Judge Marrero, and then  
17     Judge Marrero can decide in the context of the concerns he has  
18     already expressed whether that's appropriate.

19            MS. HOFFMANN: Your Honor, I just need to make one  
20     statement here. This was an investigation undertaken by the  
21     state in the public interest. We entered into a settlement  
22     with Bank of America that encompassed many, many factors. We  
23     believe that it's a settlement that's in the public interest  
24     and in the interest of the parties that are going to be able to  
25     elect to claim restitution if they wanted to.

15BMMUNC

1           And I really have a problem with Mr. Hausfeld's  
2       assertion that this settlement is in some sort of black box and  
3       done in an obfuscatory manner that will injure parties that  
4       were hurt by the conduct of the conspirators.

5           THE COURT: I thought the black box analogy was  
6       perfectly appropriate, but that's just me.

7           MR. HAUSFELD: Thank you, your Honor.

8           MR. SULLIVAN: Your Honor, if I can interject. The  
9       implication of the black box is, I think -- it has connotations  
10      that could be misleading.

11          The negotiation was undertaken between the Bank of  
12      America and the states in good faith over a significant period  
13      of time with a substantial volume of information and data  
14      exchanged and provided at the same time, the same data and  
15      analysis was provided to the class plaintiffs. There was full  
16      discussion, full disclosure of what Bank of America's position  
17      was with respect to settling this matter, detailed information  
18      was provided, volumes of information was provided to the class.  
19      Bank of America suggested that the class and the AGs and the  
20      Attorneys General worked together. The Attorneys General chose  
21      not to. They have every right to make that position.

22          The notice that's going to go out will not give a  
23      formula that's based on work product. No notice in the class  
24      that has been presented in this matter has included such a  
25      formula. One of the more recent notices that Mr. Hausfeld

15BMMUNC

1 participated in makes no mention at all of a plan of allocation  
2 in a five-page notice. And there are other examples like that.

3 So I think while we are happy to have this discussion  
4 about whether the formula should or shouldn't be provided in  
5 the notice with Judge Marrero, I don't think discovery is  
6 necessary to get us to that point.

7 THE COURT: I don't know why we are going over this  
8 again.

9 MR. SAVERI: Your Honor, first of all, we represent  
10 individuals to whom Mr. Sullivan never produced the information  
11 that he described. I don't think that's really the point of  
12 why we are here today.

13 My clients are going to ask me, when they receive the  
14 notice, what this number is, what it represents, and how it was  
15 calculated. What we are asking for in terms of discovery is  
16 the kind of information in a notice and in the material that's  
17 provided to people who received that to make an informed  
18 decision, and that's why we are here today. If that  
19 information is not going to be provided, we understand that.  
20 But it means that our clients are going to have a very  
21 difficult time in making an informed decision about the letter  
22 that they received. And having done class action work for a  
23 number of years, this kind of notice would not comport with  
24 ordinary standards and the kind of due process notice that's  
25 required. But we understand your Honor's position. But why we

15BMMUNC

1 are here and why we asked is to get that kind of information in  
2 the notice that ordinarily people, entities, sophisticated  
3 businesses need to make the decision. That's the kind of  
4 simple request. I haven't heard very much about burden. I  
5 have heard about confidentiality. We understand your position.  
6 I just wanted to make that clear.

7 THE COURT: This is a policy decision, I guess, that  
8 Judge Marrero is going to have to make which is, is this going  
9 to be like the class notice? Is that what it's going to look  
10 like? Or is it something far less than that? And if there  
11 was -- I go back to what I said at the beginning. If it was  
12 something simple and nonburdensome, I would say just give it  
13 and at least it could be presented in a little more detail to  
14 Judge Marrero as to what you would be proposing to put in.  
15 When issues of work product are raised and they are not  
16 frivolous, I feel I have to put it over, as it were.

17 MR. HAUSFELD: Your Honor, if I may, I believe you  
18 have accurately described the dilemma. It is to some extent a  
19 policy decision. And without further guidance or without  
20 preguidance from the Court it makes it even more difficult at  
21 this point to select out what type of notice Judge Marrero was  
22 thinking of and what were underlying his concerns that he  
23 expressed in his March 1 order.

24 There are two other areas that we wish to go into, but  
25 I think that they are already kind of covered in the discussion

15BMMUNC

1 we have. We are going to want to see the basis for the  
2 statement of allegations. And in terms of burdensomeness, if  
3 they have that, will they turn it over to us in a meaningful  
4 manner. That is tied with your Honor's considerations of  
5 relevance and possibly that's -- that is a decision, as your  
6 Honor has said, that needs to be left to the Court.

7 THE COURT: You're referring to what letter, letter C?  
8 What are you talking about, the basis for the allegation?

9 MR. HAUSFELD: There is in the notice --

10 THE COURT: No.

11 MR. HAUSFELD: Yes, it is C, your Honor.

12 THE COURT: Letter C, which is characterized as the  
13 representations made by Bank of America to the Attorney  
14 Generals to support the settlement amount.

15 MR. HAUSFELD: Right. There is a running, several  
16 multi page statement of what the state AGs are prepared to  
17 prove at a trial, and we would like to see the basis for that.

18 THE COURT: You're asking what Bank of America told  
19 them, not --

20 MR. HAUSFELD: It's unclear whether it was Bank of  
21 America or it was more than Bank of America.

22 THE COURT: I'm reading your letter. You asked for  
23 representations of Bank of America. Now you want something  
24 else?

25 MR. HAUSFELD: Yes. Because based on what

15BMMUNC

1 Mr. Sullivan has said, I take that the bank has provided  
2 nothing differently to the state AGs than they had already  
3 provided to the class plaintiffs.

4 But what the state AGs have said in their statement to  
5 the class is they have information that they have gathered in  
6 their investigative efforts, which they do not limit to Bank of  
7 America, which support the allegations by the states that there  
8 has been collusive conduct in the market for derivatives  
9 generally, not just those engaged in by Bank of America.  
10 Either they have those documents and we are asking for them to  
11 be turned over, or it's too burdensome to produce them. We  
12 don't want any notes or any work product.

13 THE COURT: This would presumably come exclusively  
14 from the AG, because you got whatever it is from the Bank of  
15 America.

16 MR. HAUSFELD: Yes.

17 THE COURT: I'll hear from them on burden.

18 MS. HOFFMANN: Your Honor, my understanding of this  
19 request is that the class counsel are requesting essentially  
20 all of the information compiled during the three-year  
21 investigation that we have conducted in this industry pursuant  
22 to our subpoena power.

23 Let me say two things about that. One is, we believe  
24 that class counsel now have a considerable amount, if not all  
25 of that information, not including work product, because they

15BMMUNC

1 have access to things like audiotapes and documents and e-mails  
2 and data from many of the participants in the industry. That's  
3 my understanding of the correspondence I have seen on the  
4 docket relating to discovery in this matter.

5 And apart from that, your Honor, again, this is part  
6 of our investigatory file, class plaintiffs have served our  
7 office with a Freedom of Information law request, which we are  
8 addressing and will respond to in due course, consistent with  
9 the policies of the office. But we are not prepared to turn  
10 over our investigatory files voluntarily to the class.

11 THE COURT: So it's burden, it's work product. What's  
12 the problem?

13 MS. HOFFMANN: Your Honor, it's a confidential  
14 investigation, and we don't believe it's relevant to the  
15 notice.

16 I should also point out --

17 THE COURT: So there is no burden. It's work product?

18 MS. HOFFMANN: Your Honor, it would be enormously  
19 burdensome.

20 THE COURT: Ms. Hoffman, I'm trying to get you to  
21 answer my question. I hope you won't feel put upon if I just  
22 ask you to state on the record whether it's burden or work  
23 product or both.

24 MS. HOFFMANN: Your Honor, I apologize. It's both.  
25 And, your Honor, I also want to mention, we have reviewed,



15BMMUNC

1 although we do not believe that our settlement is subject to  
2 the same kind of scrutiny as the Rule 23 settlement, we have  
3 reviewed notices in class actions, and none of them revealed  
4 the basis for allegations in terms of documentation to a group  
5 of plaintiffs before they have chosen whether they are going to  
6 opt in or opt out of the settlement.

7 THE COURT: I'll accept the representation on burden,  
8 that this would be very burdensome. Of course, I can see a  
9 work product issue. Again, this fits into this larger picture  
10 problem of what their vision is of what's required to be  
11 disclosed in the notice.

12 In light of the burden and the work product issue, I  
13 am not going to order discovery at this point at this time.

14 What's left?

15 MR. HAUSFELD: Your Honor, with respect to the burden  
16 generally and work product, normally, in order to assert a work  
17 product privilege, it can't be asserted in the abstract. We  
18 have not heard any particulars as to what specific information  
19 is deemed to be work product so we can challenge that. Could  
20 we get a log?

21 THE COURT: Not from a nonparty who has not even had a  
22 subpoena or anything else. That would be burdensome in and of  
23 itself. I think it's better for the big picture to be decided  
24 before we get to that point.

25 MR. HAUSFELD: I don't disagree, your Honor. I think

15BMMUNC

1 it is a situation where the big picture is to be clarified by  
2 the Court because for the Court to accept at face value, and it  
3 may be correct, though, that the production, for example, of a  
4 formula upon which it's represented they base the allocation on  
5 involves work product, is a little stretch.

6 Normally, traditionally, there would be an ability to  
7 test, what is work product separate from the formula? Can the  
8 formula be produced without the work product? With regard to  
9 burdensome, that would normally be a request, for example, to  
10 provide an index or an inventory. That shouldn't be  
11 burdensome.

12 THE COURT: We are in a little bit of a streamlined  
13 process here. This is not typical discovery. This is our  
14 effort to quickly determine what we can get to allow you to  
15 give comments on a notice that's not part of this case and for  
16 which there are reasons not to delay. I don't think that these  
17 typical requirements of Rule 26 discovery are necessary.

18 MR. SAVERI: Your Honor, I would just say, at a  
19 minimum, if there is a burden claim, it must be particularized  
20 at some level, and the simple affirmation, that, yes, it is  
21 burdensome, I would submit, respectfully, is insufficient.

22 THE COURT: And which burdensome affirmation did you  
23 feel was insufficient, the one as to every document that  
24 supports their allegations?

25 MR. SAVERI: I don't want to rewind the tape, but with

15BMMUNC

1 respect to the plan of allocation, I didn't think that there  
2 was a particularized showing of --

3 THE COURT: I didn't think there was any burden  
4 showing on that.

5 MR. SAVERI: Excuse me, your Honor?

6 THE COURT: I think the showing that I accepted was  
7 that it was confidential and work product rather than burden.

8 MR. SAVERI: Excuse me, your Honor. Maybe I didn't  
9 hear that correctly. But with respect to the last point, it  
10 seems to me --

11 THE COURT: The last point meaning every document that  
12 supports --

13 MR. SAVERI: We are talking about the particular  
14 statements and information that may have been provided by Bank  
15 of America and others.

16 THE COURT: No, no, no. Not Bank of America, because  
17 I think everyone agreed they had that. It was the non Bank of  
18 America documents, wasn't it?

19 MR. SULLIVAN: Your Honor is correct.

20 THE COURT: And then the Attorney General said, now  
21 you're asking us to talk about every subpoena we issued as part  
22 of this three-year investigation. That seems so obvious that  
23 would be work product and burdensome and they would have a  
24 confidentiality interest in not revealing the scope of their  
25 investigation. I didn't require anything further. If there is

15BMMUNC

1 some particular question you want asked, I don't mind seeing if  
2 we can use this opportunity to get an answer.

3 MR. SAVERI: No, your Honor.

4 MR. HAUSFELD: Your Honor, for purposes of the record,  
5 if I may, your Honor has expressed that this request for  
6 discovery and this search for information is, I think the words  
7 you used are not part of this case.

8 THE COURT: It's not part of the claims in this case,  
9 the merits of the claims, which is what Rule 26 applies to, the  
10 claims or defenses in this case.

11 MR. HAUSFELD: I respectfully differ, your Honor.

12 THE COURT: Hold on. Stop. If you would like to  
13 obtain this discovery for some other purpose, which is to prove  
14 your claims in this case, we will have a very different track  
15 for that and it will not be expedited. It will involve  
16 subpoenas and document requests and the need to be consistent  
17 with my prior order. That's fine. I'm not saying -- I'm not  
18 making any ruling as to the relevance or burden or  
19 producibility of any of this material with respect to your  
20 claims or defenses in this case.

21 MR. HAUSFELD: There is an aspect of what has occurred  
22 which Judge Marrero clearly took note in his March order.  
23 Because if he wished to do nothing, if he felt that this was a  
24 process that could occur totally outside the oversight or  
25 supervision or jurisdiction of this Court, he would have done

15BMMUNC

1 nothing. He did something.

2 THE COURT: Obviously, I'm open to some discovery or  
3 we wouldn't be here. I would have just issued an order saying  
4 you're entitled to no discovery on this.

5 MR. HAUSFELD: But the discovery issue goes to the  
6 dilemma your Honor identified with respect to the policy behind  
7 Judge Marrero's concerns, what type of notice is this.

8 Before notice would go out in a typical class action,  
9 there would had to have been a motion for preliminary approval  
10 and there would have had to have been a decision by the Court  
11 that it made sense to do that and that the proposal was fair  
12 and reasonable.

13 THE COURT: We would have a fairness hearing, in fact.

14 MR. HAUSFELD: No. The fairness hearing would occur  
15 after notice.

16 THE COURT: Whatever.

17 MR. HAUSFELD: But that step has been bypassed through  
18 this process. And the fairness hearing, as well, that would  
19 have occurred subsequently is likewise bypassed. So there are  
20 no indicia of a traditional review or oversight by a Court to  
21 determine whether or not a settlement is fair or reasonable or  
22 a claimant should accept or not accept participation in a  
23 particular settlement.

24 THE COURT: We are a little bit spinning our wheels  
25 here. This is the very policy issue that I said is going to

15BMMUNC

1 have to be brought up with Judge Marrero.

2 MR. HAUSFELD: All I wanted to do, your Honor, and I  
3 appreciate your indulgence in allowing me to state that for the  
4 record, we do believe that's a policy issue. We do believe  
5 that issue needs to be decided, given the observations about  
6 what is and is not being said in the notice.

7 One of the things that was somewhat disturbing in  
8 terms of an acknowledgement this morning, in one of the letters  
9 from the state AGs, there was a reference made to the fact that  
10 by reason of this seeking of the discovery by the class  
11 plaintiffs and the California plaintiffs, the ability of the  
12 state AGs to send out this notice has been unduly delayed. But  
13 given what the state AG said, they are not even ready yet to do  
14 that themselves. So there are representations being made that  
15 don't accurately characterize this process. And I think --

16 THE COURT: Duly noted. I am not sure it's relevant  
17 to any of our issues today other than the fact that we are not  
18 in perhaps the rush that we were told about earlier. But it  
19 really doesn't affect what I was doing because I am prepared  
20 for what I view as nonburdensome discovery to require it. And  
21 if it takes a few weeks, that's not a problem for me. But we  
22 have larger issues than that.

23 MR. HAUSFELD: Yes, your Honor. And as your Honor has  
24 stated a number of times, to which we agree, those larger  
25 issues need to be decided and addressed by the Court.

15BMMUNC

1 THE COURT: Any other topic areas that have not  
2 essentially been disposed of by what you said? Is there  
3 something that you agree is not burdensome and is not subject  
4 to an objection that I think is reasonable?

5 MR. HAUSFELD: I don't think anything --

6 THE COURT: The famous data from Mr -- begins with a  
7 Z.

8 MR. HAUSFELD: Zwerner. It took us six weeks to seek  
9 the information and two hours to learn that the Bank of America  
10 had no information to give us because Mr. Zwerner is no longer  
11 in their control, and they cannot state with any certainty  
12 whether or not what he did had any impact on the financial  
13 materials that were disclosed to us.

14 MR. SULLIVAN: Your Honor, may I correct the record  
15 again. Mr. Hausfeld must have misspoke because we told class  
16 plaintiffs, as soon as this order information was filed and we  
17 had the first discussion about it, that the reason we could not  
18 proffer any information to the class plaintiffs about this  
19 order information before that time was because we didn't learn  
20 of it ourselves. It only came to us from the Justice  
21 Department. But they knew that we didn't have access to  
22 Mr. Zwerner immediately. It didn't take six weeks to get --  
23 for them to get that information.

24 We did go through with them and spent three hours with  
25 them two days ago and went through the particular trades that

15BMMUNC

1 are in the so-called kitty and provided what information we  
2 have been able to gather based upon our own investigation, even  
3 though the results are limited.

4 But to get to the question of discovery versus notice,  
5 which is, I think, what you were asking about, the class has a  
6 proffer. They have the documents. The Oakland plaintiffs,  
7 along with West Virginia, sent us a discovery request for this  
8 information. To the extent they have requested information,  
9 they will get it this Friday, the 13th of May. So I think,  
10 unless there is disagreement from the plaintiffs here, I think  
11 we can proceed on the basis that they will have that discovery  
12 by no later than Friday, May the 13th.

13 MR. HAUSFELD: What we were seeking the discovery for  
14 was what was just not addressed, which is whether or not that  
15 what Mr. Zwerner did affected the financials. The answer to  
16 that is the bank does not know. We are satisfied with that  
17 answer as of now, and we are not seeking any further  
18 information from the bank on that.

19 THE COURT: That's the end of it?

20 MR. HAUSFELD: Yes.

21 THE COURT: Anything else on your list of desired  
22 discovery that we have not covered?

23 MR. SAVERI: Your Honor, I think that in large part  
24 our request with respect to Zwerner has been dealt with by the  
25 previous discussion. Just for purposes of the record, we



15BMMUNC

1 requested -- among the material we requested was some  
2 information about whether the plan of allocation or other  
3 materials that would be used to determine shares to individual  
4 class members or potential opt-ins to this settlement was  
5 affected by any tainted data. I am not going to belabor that  
6 because I think you have already heard argument about the  
7 extent to which we are entitled to material regarding the plan  
8 of allocation.

9 To my mind, it would be a subset of that and I don't  
10 mean --

11 THE COURT: Just to be clear, I'm willing to order  
12 discovery on what might even be potentially irrelevant matters  
13 as long as I don't see a burden or a work product problem.  
14 This might have been an area where I would like to have you get  
15 this information and with that information you could make the  
16 argument to Judge Marrero. The only reason you haven't gotten  
17 the other information is I felt they were really burdensome as  
18 to work product and confidentiality concerns. I am not sure I  
19 feel this way about this data. Is there something you want  
20 that you have not been getting?

21 MR. SAVERI: What we would want, and maybe this would  
22 be subject to some kind of response from the AGs or the B of A,  
23 we want to know whether the plan of allocation as it was  
24 determined, or whatever the basis is of the plan of allocation,  
25 whether it has been affected or tainted by the information

15BMMUNC

1 that, apparently, because of Mr. Zwerner's activity, was  
2 fraudulent or might be otherwise unreliable. And I don't  
3 know --

4 THE COURT: This could be a very narrow question that  
5 perhaps they wouldn't mind answering, which is that for  
6 purposes of doing any calculations they did, in line No. 208 or  
7 whatever it is that has the data that shows the revenue, did  
8 they rely on Bank of America's data, which you believe is  
9 tainted and which they may have other explanations for.

10 MR. SAVERI: That's correct, your Honor. I didn't  
11 want to prejudgement answer --

12 THE COURT: It's possible they won't object to answer  
13 that. We will turn to them and find out.

14 MS. HOFFMANN: Your Honor, I can answer that question  
15 right away. We have looked at this Zwerner data. We have gone  
16 through it. We are taking it into account in allocating the  
17 restitution part.

18 THE COURT: You are not taking Bank of America's data  
19 at face value.

20 MS. HOFFMANN: That is correct.

21 THE COURT: Bank of America's input --

22 MS. HOFFMANN: With regard to the transaction, which  
23 the Zwerner kitty, we are taking it into account in revising  
24 the allocation so that --

25 THE COURT: How are you taking it into account?

15BMMUNC

1 MS. HOFFMANN: I am not trying to be evasive here. I  
2 understand my very basic understanding is that sometimes the  
3 profits were overstated, sometimes they were understated. We  
4 are figuring in those precise amounts to the extent we can to  
5 determine --

6 THE COURT: Are you just willing to describe perhaps  
7 in writing what you did to do that? In other words, how do you  
8 know that something was over or understated?

9 MS. HOFFMANN: I will have to talk to my group. I  
10 think in principle what we are willing to say today is we are  
11 taking it into account on a transaction by transaction basis  
12 for purposes of the allocation.

13 THE COURT: Would you want more than that?

14 MR. SAVERI: Your Honor, with respect, I would like an  
15 answer to the last question you asked, how was it taken into  
16 account.

17 THE COURT: And you don't know whether you want to  
18 answer that?

19 MS. HOFFMANN: I don't know whether we can describe it  
20 to a greater extent than I have just described it.

21 THE COURT: Someone could answer it, presumably. And  
22 someone must be able to say that there was some method by which  
23 they decided something was over or under, based on some  
24 principle.

25 MS. HOFFMANN: I think perhaps, your Honor, with all

15BMMUNC

1 respect, perhaps this can be addressed best by looking at the  
2 language in the notice regarding allocation and trying to  
3 propose more detailed language that would take into account  
4 this issue as well.

5 THE COURT: Let me change the topic area.

6 On the question of answering this question, I guess we  
7 could put off to see if they are willing to answer it. And if  
8 they don't, that would be another complaint to Judge Marrero.

9 My suggestion is, you write a letter either saying we  
10 are not going to give you further information or providing the  
11 methodology or whatever else. If you can do that --

12 MR. SAVERI: That seems perfectly fair, your Honor.

13 THE COURT: Do that in the next few days. If you  
14 don't give it, explain why you are not giving it, burden, work  
15 product, whatever it is. Please explain in detail.

16 MR. SAVERI: That works for us, your Honor.

17 THE COURT: Anything else on your list?

18 MR. HAUSFELD: Nothing, your Honor.

19 THE COURT: I guess we need a plan of action.

20 I suppose what you could do is consider this in an  
21 aisle of discovery in any areas where I didn't give you the  
22 discovery, and then you should somehow make a presentation to  
23 Judge Marrero.

24 I guess there is two ways you can do this. One is,  
25 you could object to the failure to get the discovery. The

15BMMUNC

1 other way, which might be better, would be to do it all in one  
2 package, which is to say, here is our comments to the class  
3 notice with the information we have now. Here is why it's  
4 totally inadequate, because we didn't get discovery on this,  
5 that, and the other thing, and here is why we need that  
6 discovery. Because we want to be able to beef up this notice  
7 to have the following kinds of things, and discovery would  
8 allow us to do that. I think that's the better way to do it.

9 When do you think you can put that together?

10 MR. HAUSFELD: That would depend in large part on the  
11 production that your Honor did grant discovery on, and that's  
12 the list, and I would say within two weeks of getting that  
13 list.

14 THE COURT: That's fair. And then you would  
15 presumably respond to that letter to Judge Marrero?

16 MR. SULLIVAN: Yes, we would, your Honor. We could  
17 respond to that within a week. I would like to at least  
18 explore this so we can move this along. I know the state has  
19 an interest in moving this along. We would like to get this  
20 issue resolved and potentially move us forward in other aspects  
21 of this case.

22 Knowing precisely who is on the list is not going to  
23 be necessary for the plaintiffs to make their arguments to  
24 Judge Marrero about the content of the notice because the  
25 content of the notice is going to go to those parties. They

15BMMUNC

1 will get those parties.

2 THE COURT: Why do you need the actual list in order  
3 to make these arguments?

4 MR. HAUSFELD: So that we can determine an argument  
5 that we would make as to the adequacy of the -- to whom the  
6 notice is being sent. And then we can check the names of the  
7 entities will be accompanied by the transactions, so we will be  
8 able to know why they are getting this and who is getting it.  
9 And, in our opinion, we want to object to that aspect of the  
10 notice as well.

11 THE COURT: There is your answer. What do you want to  
12 say about it? Are we going over a week here? I thought this  
13 list was coming pretty soon.

14 MR. SULLIVAN: I think the AG suggested it would be  
15 within about a week.

16 THE COURT: We are arguing over one week. This is not  
17 worth it.

18 MR. SULLIVAN: Why don't we schedule it for say two  
19 weeks.

20 THE COURT: Two weeks from when they get the list.  
21 The Attorney General has every incentive to speed this along.  
22 They are the ones that have the greatest interest. I am going  
23 to rely on them to act expeditiously. Maybe the two-week  
24 period is too long. It seems to me you can pretty much prepare  
25 this starting now. Can you do it one week from when you get

15BMMUNC

1 the list. This is all on the table right now. You've written  
2 the letters anyway.

3 MR. HAUSFELD: Again, your Honor, being of utmost  
4 candor, we are coming into graduation season. A lot of  
5 people --

6 THE COURT: That's why I don't want to put it any  
7 later.

8 MR. HAUSFELD: That's why I said give me two weeks so  
9 we can work our personnel in a way that we can get it done  
10 within two weeks of when we get it.

11 THE COURT: Here is what I am going to do. Let's say  
12 one week. If you need more time, talk to the other side. If  
13 there is a dispute, write me a letter. I'll be very reasonable  
14 about extensions. Let's shoot for one week. Let's start  
15 preparing it now. If you need more time, just come back to me.

16 MR. HAUSFELD: Thank you.

17 THE COURT: One week for the response.

18 Anything else from plaintiffs?

19 MR. HAUSFELD: No, your Honor.

20 THE COURT: From your side?

21 MR. SULLIVAN: No, your Honor.

22 THE COURT: Thank you.

23 o0o